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No. 390

In the Supreme Court of the United States

OCTOBER TERM, 1948

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (II R. 40) is reported at 169 F. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for want of a final judgment is reported at 163 F. 2d 940.

JURISDICTION

The judgment of the Court of Appeals was rendered August 3, 1948 (II R. 47). The peti-

tion for writ of certiorari was filed October 30, 1948, and was granted on January 3, 1949. The jurisdiction of this Court is founded on the provisions of Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Petitioner was designated by a New York court as the temporary receiver of the assets of an Austrian national, which assets consist of a debt owed by a third party. The appointment took place two days before the freezing of all transactions in Austrian property by Executive Order. After the date of freezing petitioner was designated permanent receiver. Thereafter the debt was vested by the Alien Property Custodian. Two questions are presented:

(1) Whether, under New York law, title to the debt in suit passed to the petitioner prior to the date of freezing by virtue of his appointment as temporary receiver.

(2) Whether, in the absence of a federal license, title to the debt in suit could pass to the petitioner, after the date of freezing, by his appointment as permanent receiver.[1]

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[1] The writ of certiorari was limited to questions 1 and 2 presented by the petition (II R. 48). Counsel have been advised orally by the Clerk that the Court also desires discussion of the final question presented in the Government's memorandum on the petition (pp. 11-12). The three questions resolve themselves into the two above set forth.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the statutes and Executive Orders involved are set out in the Appendix (pp. 56–80).

STATEMENT

This action was begun on April 22, 1946, in the District Court for the Southern District of New York by the Alien Property Custodian [2] to enforce certain portions of a vesting order (No. 2097, I R. 112–115) by which the Custodian had vested all rights of various named European societies under copyrights for the performance of musical compositions. The complaint (I R. 5), in three counts, alleged that certain royalties were owing by the defendant, American Society of Composers, Authors and Publishers (hereinafter called "ASCAP") to three of the societies named in the vesting order and sought the payment to the Custodian of those royalties. The second count of the complaint (I R. 7–11), the only count involved in this case, claimed the royalties allegedly owing to an Austrian cooperative association, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten and Musikverleger (hereinafter called "A. K. M."). That count named the petitioner as a co-defendant with ASCAP, alleging

[2] Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, was duly substituted for James E. Markham, Alien Property Custodian (I R. 150). The term "Custodian" will be used herein to refer to the original or the substituted plaintiff as the context may indicate.

that he, as receiver of A. K. M., had made claim to the funds. The complaint prayed that the court adjudge that the Custodian, by virtue of his vesting order, had acquired full title to the debt of ASCAP to A. K. M., to the exclusion of the petitioner, and that the Custodian recover judgment against ASCAP for the royalties claimed (I R. 14–15).

On motions for judgment on the pleadings or for summary judgment, filed by the petitioner (I R. 70) and the Custodian (I R. 92), the District Court entered a judgment declaring that the petitioner has no right, title or interest in the funds which were the subject of the second count (I R. 153). Thereafter, judgment was entered on that count against ASCAP, directing it to pay over to the Custodian the amount of $46,839.54 (II R. 25). On appeal by the petitioner[3] the judgments of the District Court were affirmed unanimously by the Court of Appeals (II R. 40).

The facts relating to the petitioner's claim of title to the indebtedness which was the subject matter of the second count are as follows: On June 12, 1941, on *ex parte* application by a creditor of A. K. M., the Supreme Court for New York County, acting pursuant to Section 977–b of the Civil Practice Act of New York (App. pp.

[3] ASCAP, having stipulated to the entry of the judgment against it, did not appeal. This was the second appeal by petitioner, an earlier appeal having been dismissed as premature, 163 F. 2d 940.

71–80), appointed the petitioner temporary receiver of the assets in New York of A. K. M., directing him to "take, receive and reduce to his possession any and all assets, property, credits and choses in action" of A. K. M. within the State (I R. 49–51). On June 14, 1941, two days after the petitioner's appointment, Executive Order No. 8389 (5 F. R. 1400)—the basic Order authorizing and prescribing freezing controls over foreign funds—had been amended to prohibit transactions involving Austrian property, except as licensed. (Executive Order No. 8785, 6 F. R. 2897, App. pp. 59–61.)[4] No license permitting the petitioner to engage in any transaction involving property of A. K. M. has been applied for or issued (I R. 110).

On September 29, 1941, petitioner was appointed permanent receiver of A. K. M. (I R. 56). He has reduced no assets to possession and has made no distribution to creditors (I R. 95). An action in the New York courts against ASCAP to recover the sums allegedly owed by it to A. K. M. was instituted by him on July 29, 1941 (I R. 96). Its disposition is awaiting outcome of the present proceeding (I R. 133).[5]

[4] The record does not show whether the petitioner qualified as temporary receiver before or after the date of freezing (I R. 32, 50, 52–55, 76). See *infra*, fn. 34, p. 44.

[5] For opinions of the New York courts relating to the petitioner's action against ASCAP, see I R. 117–123, 133–136; *Propper* v. *Buck*, N. Y. Law Journal, October 29, 1941, p.

SUMMARY OF ARGUMENT

Neither petitioner's appointment as temporary receiver of the assets of A. K. M. (prior to the freezing, by Executive Order, of those assets) nor the petitioner's appointment as permanent receiver (after freezing) passed to him any title to the funds in suit. The first appointment, as temporary receiver, passed no title by the provisions of the New York statute. The second appointment, as permanent receiver, passed no title because there had already intervened the application of federal freezing controls which forbade transfers involving the property of A. K. M., an Austrian national. A. K. M. thus retained title to its assets until the date of the Custodian's Vesting Order; by virtue of that Order all right and title passed to the Custodian.

1. While under the New York statute involved, a permanent receiver ordinarily takes title to the corporate assets, in this case there intervened the federal freezing regulations. Executive Order No. 8389 became effective with respect to Austrian property on June 14, 1941. The Executive Order explicitly prohibits, *inter alia*, all un-

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1268, col. 5; *Propper* v. *Buck*, 32 N. Y. S. 2d 103 (1st Dept.); *Propper* v. *Buck*, 178 Misc. 76, 33 N. Y. S. 2d 11 (Sup. Ct. N. Y. Co.), affirmed, 263 App. Div. 948, 34 N. Y. S. 2d 134; *Propper* v. *Taylor*, 186 Misc. 70, 58 N. Y. S. 2d 829 (Sup. Ct. N. Y. Co.), affirmed, 270 App. Div. 890, 62 N. Y. S. 2d 602 (1st Dept.); *Propper* v. *Taylor*, 186 Misc. 72, 58 N. Y. S. 2d 831 (Sup. Ct. N. Y. Co.), modified, 270 App. Div. 890, 62 N. Y. S. 2d 601 (1st Dept.).

licensed "transfers * * * of, or dealings in * * * any evidences of indebtedness or evidences of ownership of property" of Austrians. No license has been issued for a transfer to the petitioner. It follows that a transfer of title by the state court's order appointing petitioner permanent receiver was prohibited by Executive Order No. 8389. The state court did not purport to override the Executive Order; had it done so, its decision could not be given effect.

Explicit confirmation of the effect of the Executive Order is found in General Ruling No. 12 of the Treasury Department, which is a construction of the Executive Order and can also be viewed as a regulation having independent force. The Ruling declares null and void any unlicensed transfers of property in violation of the Executive Order. It specifically covers transfers by judicial process or order of property such as A. K. M.'s claim against ASCAP. It is therefore evident that under Executive Order No. 8389 and General Ruling No. 12 the petitioner could not acquire any interest in the claim on or after June 14, 1941, in the absence of a federal license. A contrary conclusion—construing the Order and Ruling to permit unlicensed transfers of title—would defeat the purpose of the Government's detailed program for the regulation of foreign funds during the war and the preceding period of declared national emergency. And it would permit those who cooperated with Axis loot-

ers to flout the Order now to realize upon their ventures.

2. The petitioner's appointment as temporary receiver of A. K. M. did not, under the New York statute, invest him with title to A. K. M.'s assets. The two lower courts, composed of judges of long experience in New York law, so held, and their decision should stand.

In any event, the decision below is correct. In New York, as elsewhere, temporary receivers do not have title to the corporate assets, either in equity or in statutory proceedings, and nothing in the governing statute indicates that a different rule is intended to apply. Indeed, the section contains affirmative evidence that only a permanent receiver is to have title. The plan of the statute and the sequence of its paragraphs make it clear that Subdivision 4, which specifies the duties of the temporary receiver, is designed to be exclusive. That subdivision limits those duties to the holding and preserving of the corporate assets. The provision of Subdivision 19 that "the receiver" shall have title to the corporate assets, read in its context, is a reference to the permanent receiver only. The contrary conclusion could have the anomalous result that by an *ex parte* proceeding, in which the appointment of a temporary receiver is mandatory and there is no judicial determination of the need for such a receiver, the corporation could be deprived of title to its assets.

ARGUMENT

The facts are simple: Under a New York statute for the liquidation of the local assets of dissolved or dormant foreign corporations, the petitioner was on June 12, 1941, appointed temporary receiver of the New York assets of A. K. M., an Austrian national. On September 29, 1941, he was appointed permanent receiver. Between these two dates there intervened the application of federal freezing controls to the property of Austrian nationals, under which transactions involving A. K. M.'s property were prohibited except as licensed. No license was issued. In 1943 the Custodian vested the only asset of A. K. M.—a claim against ASCAP. The petitioner's asserted interest in this claim is rested upon his successive appointments as temporary and permanent receiver.

The Government contends, as the courts below held, that neither of these appointments, nor any other acts in the course of the New York court proceeding, passed any title to the petitioner, and, therefore, that the 1943 Vesting Order gave full and good title to the Custodian. Specifically, we contend that the petitioner could not, under federal law, have acquired title to the claim after June 14, 1941, when freezing controls were applied to A. K. M.'s property. And the petitioner did not, under New York law, acquire title before the date of freezing.

I

EXECUTIVE ORDER NO. 8389 PROHIBITED ANY TRANSFER, ON OR AFTER JUNE 14, 1941, OF TITLE OR INTEREST IN THE DEBT IN SUIT, WHETHER BY PRIVATE OR JUDICIAL ACTION

The petitioner contends (Brief, pp. 33–53) that by his appointment as permanent receiver on September 29, 1941, he acquired title to the claim of A. K. M. against ASCAP. The contention, and any contention based on acts occurring on or after June 14, 1941, must fail, we believe, because on that date there intervened the application of federal freezing controls to the property of A. K. M. as an Austrian national. Although the issues are thus narrowly framed, they raise a question basic to the entire federal program for the regulation of foreign funds adopted after the outbreak of the war in Europe. To place this question in its proper context, it is necessary to set out the origins of the program.

A. THE BACKGROUND AND LEGISLATIVE BASIS OF THE FREEZING OF AUSTRIAN PROPERTY

The system of freezing controls rests upon Section 5 (b) of the Trading with the Enemy Act, as amended by the Joint Resolution of May 7, 1940, 54 Stat. 179 (App., pp. 56–57), and as further amended by Section 301 of the First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App. 5 (b) (App., pp. 56–58).

The application of freezing controls to Austria and other countries on June 14, 1941, was the

culmination of a program instituted more than a year earlier. Executive Order No. 8389 of April 10, 1940, issued pursuant to Section 5 (b) of the Trading with the Enemy Act, prohibited transactions involving property of Norway or Denmark or their nationals, except as licensed under regulations simultaneously issued (40 Stat. 411, 415, as amended, 48 Stat. 1, 5 F. R. 1400, 1401). The Order followed by two days the German invasion of the two countries involved. As was plain, its primary purpose was to prevent any benefit to the invaders by means of transfers of the property of those countries and their nationals.[6] The following month, the Order and the regulations were explicitly ratified by the Congress in the Joint Resolution of May 7, 1940, 54 Stat. 179, Appendix, p. 57. That Resolution also amended Section 5 (b) of the Act to authorize the President to

> investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in,

[6] The purpose of the Order and its amendments, and the legislative history of the statute involved, are discussed below, pp. 30–37.

> any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; * * *

The country by country extension of freezing controls, in the years 1940 and 1941, kept pace with the extension of aggression in Europe:

May 10, 1940, The Netherlands, Belgium and Luxembourg,[7]

June 17, 1940, France,[8]

July 15, 1940, Latvia, Esthonia and Lithuania,[9]

October 10, 1940, Rumania,[10]

March 4, 1941, Bulgaria,[11]

March 13, 1941, Hungary,[12]

March 24, 1941, Yugoslavia,[13]

April 28, 1941, Greece.[14]

Finally, on June 14, 1941, "by virtue of the existence of a period of unlimited national emergency," declared on May 27, 1941, the President extended the controls of Executive Order No. 8389 to all of continental Europe. Proclamation 2487, 6 F. R. 2617; Executive Order No. 8389, as amended

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[7] Executive Order No. 8405, 5 F. R. 1677.
[8] Executive Order No. 8446, 5 F. R. 2279.
[9] Executive Order No. 8484, 5 F. R. 2586.
[10] Executive Order No. 8565, 5 F. R. 4062.
[11] Executive Order No. 8701, 6 F. R. 1285.
[12] Executive Order No. 8711, 6 F. R. 1443.
[13] Executive Order No. 8721, 6 F. R. 1622.
[14] Executive Order No. 8746, 6 F. R. 2187.

by Executive Order No. 8785, 6 F. R. 2897, Appendix, pp. 59–61.[15] The Government announced that the Executive Order "is designed, among other things, to prevent the use of the financial facilities of the United States in ways harmful to national defense and other American interests, to prevent the liquidation in the United States of assets looted by duress or conquest, and to curb subversive activities in the United States." Press Release No. 1, June 14, 1941, U. S. Treasury Department, *Documents Pertaining to Foreign Funds Control* (1946), p. 64.

Immediately upon the entry of the United States into the war, the Congress, in the First War Powers Act, 1941, further amended Section 5 (b) of the Trading with the Enemy Act to broaden the President's powers over foreign property, and to confer explicitly the powers to "nullify, void, prevent or prohibit" any transfers of or dealings in property in which a foreign country or national thereof had an interest (Sec. 301, First War Powers Act, 1941, 55 Stat. 839, App., pp. 57–58). *Clark* v. *Allen*, 331 U. S. 503, 512. The Congress also expressly approved, ratified and confirmed all prior actions taken by the President or the Secretary of the Treasury under the Trading with the Enemy Act which would have been authorized had the provisions of the First War Powers Act

[15] Subsequent extensions of the Order to the countries of the Far East are not here involved.

been in effect (Sec. 302, First War Powers Act, 1941, 55 Stat. 840, App., p. 58).[16]

B. EXECUTIVE ORDER NO. 8389, AS AMENDED JUNE 14, 1941, FORBADE TRANSFERS, WHETHER PRIVATE OR JUDICIAL, OF THE DEBT IN SUIT

Executive Order No. 8389, as amended on June 14, 1941 (App., pp. 59–61) prohibits certain transactions, except as licensed, in the property of nationals of various countries, including Austria. The petitioner does not deny that A. K. M. is an Austrian national,[17] whose property is subject to the Order, and that no license for transactions in its property has ever been issued to him (I R. 110–111). He contends, in substance, that the

[16] The general constitutionality of the Government's program for the regulation of foreign property in time of threatened or actual war is no longer open to doubt, and is not challenged by petitioner. See *e. g.*, *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *United States* v. *Von Clemm*, 136 F. 2d 968 (C. A. 2), certiorari denied, 320 U. S. 769; *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345; *Alexewicz* v. *General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S. 2d 713 (Sup. Ct. Broome Co.).

[17] In Section 3, Austria is named as a "foreign country designated in this Order," and the Order is made effective as to Austria and its nationals on and after June 14, 1941. In Section 5E (ii) the term "national" is defined as including "any partnership, association, corporation or other organization, organized under the laws of * * * such foreign country." Since A. K. M. is admitted to be a "cooperative society * * * organized and existing * * * under the laws of * * * Austria" (I R. 8, 29), there can be no question that it is a "national" of a "foreign country designated in this Order," and that, therefore, its property is subject to the Order.

Executive Order does not prohibit transfers of title by judicial process, or, more specifically, a transfer of title to him, under New York law, by his appointment as permanent receiver on September 29, 1941. The Executive Order reads in part as follows:

> SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if * * * such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:
>
> A. All transfers of credit between any banking institutions within the United States * * *;
>
> B. All payments by or to any banking institution within the United States;
>
> C. All transactions in foreign exchange by any person within the United States;
>
> D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;
>
> E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

> F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

It is clear that by virtue of this section, on and after June 14, 1941, ASCAP could neither pay its debt to A. K. M. nor make payment to the petitioner as A. K. M.'s receiver. Such a payment would be a "payment by * * * [a] banking institution" within the meaning of Section 1, paragraph B of the Order. For ASCAP is comprehended by the definition of "banking institution" in Section 5F of the Order, which includes "any person holding credits for others as a direct or incidental part of his business" (App., p. 61). See Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Problems 17, 34 (1945).

The petitioner all but concedes that payment by ASCAP is prohibited; but he apparently would argue that only payment, and not transfer of title, is prohibited (Brief, pp. 43, 47). The force of the Executive Order is, however, not limited to the prohibition of *payments* contained in Section 1, paragraph B. The remaining paragraphs clearly establish that the Order is directed against transfers of ownership or of any lesser interests. Thus, the prohibition, by paragraph A, of "transfers of credit" is plainly a prohibition of the unlicensed creation of a new debtor-creditor relationship. Paragraph E even more broadly prohibits all "transfers * * *

or dealings in * * * any evidences of indebtedness or evidences of ownership of property."

A transfer to the petitioner of title or interest in ASCAP's debt to A. K. M. would thus be prohibited under paragraph A, as a "transfer[s] of credit between any banking institutions within the United States," since the petitioner, who as a receiver holds credits for others, is within the definition of "banking institution" in Section 5F of the Order. A transfer to the petitioner would, moreover, necessarily entail the making either of some formal acknowledgment by ASCAP, of a formal assignment, or of appropriate entries on ASCAP's books and on the petitioner's records. Such an act, or, indeed, any act purporting to effect the transfer, would be prohibited under paragraph E of Section 1 as a "transfer[s] * * * of, or dealing[s] in any evidences of indebtedness or evidences of ownership of property." It is obvious that the intent of the framers of this language was to bring within the scope of the Order *every* transaction affecting property in which foreign nationals had an interest.[18]

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[18] The words "dealing in" are, of course, most comprehensive. The phrase "evidence of indebtedness" has generally been held to mean any legal evidence effective to establish the existence of indebtedness, and is sufficient to include mere book entries. *Commonwealth* v. *Imperial Woolen Co.*, 290 Pa. 526, 139 A. 199; see also *Bruner* v. *State*, 26 Okla. Crim. 448, 224 P. 555; *Schalucky* v. *Field*, 124 Ill. 617, 16 N. E. 904.

The order of the New York Supreme Court appointing the petitioner permanent receiver would itself be an evidence of

The petitioner's major argument against the application of the Executive Order rests on the fact that the purported transfer to him of A. K. M.'s rights was by judicial process.[19] The question is, therefore, whether a transfer in the course

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indebtedness or, if effective to create rights in petitioner, it would constitute an evidence that ASCAP's indebtedness to A. K. M. has been transferred to the petitioner.

The entire phrase "evidences of indebtedness or evidences of ownership of property" appears, first, in the history of freezing controls in the Joint Resolution of May 7, 1940 (App., pp. 56–57). The debates, to the extent the question was touched upon, show an emphasis on the words "evidences of ownership of property," indicating its comprehensive character. Thus, Senator Wagner said (86 Cong. Rec. 5176):

"I think everybody knows what 'evidence of property' [sic] is. It is evidence one has that he owns certain property. If a person has common stock or a deed, he owns an interest in a certain enterprise or certain property. That is what the 'evidence of ownership' [sic] means."

The breadth of the intended understanding of the single word "property" is of cumulative relevance to the sweep of the entire phrase. The Treasury Department, in the regulations issued April 10, 1940, under Executive Order No. 8389, had comprehensively defined "property" as including, *inter alia*, "money * * * any debts, indebtedness or obligations * * * bills of sale, other evidences of title or ownership * * * accounts payable, judgments * * * etc." (5 F. R. 1401, App., pp. 69–70). Compare the substantially identical definition in the amended regulations, issued June 14, 1941 (6 F. R. 2905) (App., pp. 70–75).

[19] In so far as this argument rests on the notion that the receivership court had custody or *in rem* jurisdiction of the debt, and that there has been federal interference with such *in rem* jurisdiction, see the discussion below, pp. 48–50, 53–55.

of judicial action is any less prohibited by the Executive Order than a voluntary transfer, whether a payment or other type of consensual transfer, between individuals. There is, we submit, no basis for such a distinction either in the words or plain purport of the Executive Order. As the court below stated (II.R. 45):

> The language of Exec. Order 8389 prohibits the unlicensed transfer of an enemy alien's property.[20] There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings.

The possible evasion by recourse to judicial proceedings is only too plain. A transfer between A and B, prohibited when voluntary, could become effective if A sued B and B defaulted.[21] The purposes to be achieved by the system of freezing controls (*infra*, pp. 30–32) required that a federal executive agency have control and supervision over every transfer and transaction, whether voluntary or judicially created. It was for this reason that the enforcement of freezing

[20] While the court speaks only of the property of enemy aliens, the prohibition of the freezing order extended to the property of a number of neutral and friendly countries as well.

[21] The New York Supreme Court judgment appointing petitioner permanent receiver was entered by default. A. K. M. was served by publication and made no appearance (I.R. 56).

control policies was placed in the Treasury, and not left in the hands of private parties engaging in voluntary transactions or in the hands of the various state and federal courts. The courts were not entrusted with the fulfillment of these policies; they could not be expected to mold their judgments in accordance with the national interest in the freezing, and exemption from freezing, of foreign funds. The Treasury Department alone had that function, and if transfers resulting from judicial proceedings were exempted from its area of control, a large and significant gap would exist in the freezing system. Accordingly, the Executive Order unqualifiedly "prohibited" all transfers and dealings involving the property frozen, unless they were licensed, and made no exception, explicit or implicit, for transfers stemming from judicial action.

A federal court would be as powerless as a state court to effect a transfer in violation of the Order. Whatever interference with state law and procedure, however, which was occasioned by the adoption of this over-all federal order was no greater, and no less valid, than that resulting from the wartime establishment of overriding federal rent and price controls, manpower requirements, credit restrictions; or stabilization measures (cf. *Testa* v. *Katt*, 330 U. S. 386), or from the adoption of federal policies in the conduct of foreign relations (cf. *United States* v. *Pink*, 315 U. S. 203; *Steingut* v. *Guaranty Trust Co.*, 58 F. Supp. 623, 633-635 (S. D. N. Y.), affirmed, 161 F. 2d. 571 (C. A.

2)).[22] The fulfillment of the Federal Government's functions, particularly in time of war, frequently compels the restriction or modification of preexisting state law or practice, and there is no doubt that this can constitutionally be done. Plainly, if a transfer or transaction is "prohibited" by a valid federal statute or Executive Order, it cannot be enforced or independently accomplished by any court, state or federal. If the order of the New York court had purported to transfer title in violation of the freezing regulations, its judgment could not be given effect. "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb* v. *Feuerstein*, 308 U. S. 433, 439. See also *Gross* v. *Irving Trust Co.*, 289 U. S. 342; *Taylor* v. *Sternberg*, 293 U. S. 470; *Matter of Rosenberg*, 269 N. Y. 247, 199 N. E. 206. See generally, Boskey and Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 Col. L. Rev. 1006, 1016–1030 (1940).

Exercising the powers conferred by Section 5 (b) of the Trading With the Enemy Act, the President has prohibited transactions which purport, without a license, to transfer title to frozen

[22] The *Steingut* case held that certain provisions of Section 977-b of the New York Civil Practice Act—the New York statute involved here—must yield to contrary federal policies embodied in the recognition of the Soviet Union and the Litvinov Assignment.

property. We can perceive no reason for saying that the interest of the United States in controlling all transfers of foreign property during a time of national emergency is any less entitled to prevail over a conflicting judgment of a state court, or a contrary state receivership procedure, than was its interest in protecting bankrupt farmers, involved in *Kalb* v. *Feuerstein, supra*, in enforcing federal price control legislation (*Testa* v. *Katt, supra*), or in carrying on its foreign relations (*United States* v. *Pink, supra*).

Although the lack of power of the state court to act contrary to the Executive Order would seem to be determinative of the issue, if there were a conflict, it should be pointed out that the order appointing the petitioner permanent receiver (I R. 56) did not purport to pass to him title to any debt or asset which could not be lawfully passed, under federal freezing regulations or other applicable law. In a word, under the order the petitioner took only such title as A. K. M. could properly pass under law. The question of the effect of the Executive Order was not litigated in the state court proceeding, and, indeed, the United States was not a party to that proceeding. Cf. *United States* v. *United States Fidelity and Guaranty Company*, 309 U. S. 506. In the absence of the most explicit language to the contrary, the order appointing the petitioner should be construed as being in conformity with the federal Executive Order, which under the supremacy clause of the

Constitution (Art. VI, Cl. 2) formed part of the law of New York.

The petitioner's contention that his appointment as permanent receiver after the date of Executive Order No. 8389 "related back to the commencement" of the state court proceeding (Brief, p. 33) must fall with the main contention with respect to the Executive Order itself. If the petitioner had no title when the Executive Order became effective on June 14, 1941, any subsequent act, judicial or otherwise, which purported to give him such title would be a transfer prohibited or nullified by the Executive Order.[23] There is, moreover, no support for a "relation back" argument in the New York law. In that jurisdiction, it is held, in conformity with general principles of equity, that the rights of a receiver do not relate back where there have been intervening rights. *Moran* v. *Sturges*, 154 U. S. 256 (dealing with New York law); *Herring* v. *N. Y., L. E. &*

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[23] Compare the provisions of paragraph 2 of General Ruling No. 12 of the Treasury Department, (App., p. 63):

"Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order."

On General Ruling No. 12, see *infra*, pp. 24–30. On the meaning of "blocked account," see fn. 24 *infra*, pp. 24–25.

W. R. R. Co., 105 N. Y. 340, 377–8, 12 N. E. 763, 776–7.

C. AS ADMINISTRATIVELY CONSTRUED, THE ORDER FORBIDS TRANSFERS BY JUDICIAL PROCESS.

The text of the Order itself compels the conclusion that transfers of interests after June 14, 1941, are prohibited, and that a prohibited transfer has no greater effect where it purports to have been accomplished by judicial process. If any doubt remained it would be readily resolved by the provisions of General Ruling No. 12 of the Treasury Department, issued April 21, 1942, 7 F. R. 2991 (App., pp. 62–66). That Ruling provies that—

> (1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; * * *[24]

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[24] There is no question that ASCAP's debt to A. K. M. was "property in a blocked account." Paragraph 5 (b) of the Ruling defines "property" as including "credit," "debts," and "claims." "Blocked account" is defined by paragraph 5 (c) as an "account in which any blocked country [i. e., a foreign country designated in the Executive Order] or national thereof has an interest, with respect to which account payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to a license authorizing such action" (Para. 5 (c), General Ruling No. 12, App., p. 65, incorporates by reference definitions of "blocked account" and "blocked country" in General Ruling No. 4, paras. 8, 4, App., p. 62). This definition of "blocked account" is

Paragraph 5 (a) of the Ruling defines "transfer" as including "any actual or purported act or transaction * * * the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property," and then goes on specifically to include in the class of transfers affected by the Order:

> the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment.

Words could not more explicitly state that what was prohibited was a result—the creation or transfer of any interests in the blocked property—and that the accomplishment of that result by any form of judicial action, including, as here, the entry of judgment appointing a receiver, was un-

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applicable here, for, as we have pointed out (pp. 15–16, *supra*), payment by ASCAP out of its account with A. K. M. is prohibited by the Executive Order unless licensed.

Paragraph 5 (c) of General Ruling No. 12 excludes from the definition of "blocked account" one which was "not treated as a blocked account by the person with whom such account is held or maintained." This exclusion is inapplicable here, for ASCAP has consistently treated A. K. M.'s account as blocked (I R. 99–100, 124). Hence, the claimed debt of ASCAP to A. K. M. was undoubtedly "property" and "in a blocked account" within the meaning of General Ruling No. 12, *supra*.

qualifiedly prohibited and was to have no effect, that is, was to be "null and void."

The issuance of General Ruling No. 12 was an exercise of the powers conferred on the Secretary of the Treasury by Section 7 of Executive Order No. 8389 (App., p. 61) to prescribe "regulations, rulings, and instructions to carry out the purposes of this Order." It was designed to be declaratory of the scope of Executive Order No. 8389; in issuing it, the Secretary stated that "unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and * * * today's ruling serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control." Press Release No. 34, April 21, 1942, U. S. Treasury Department, Documents Pertaining to Foreign Funds Control (1946), pp. 71–72.[25]

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[25] The Court of Appeals approved the General Ruling and the explanatory statement of the Treasury Department as a correct interpretation of the Executive Order (II R. 44–45). If the Ruling were not to be regarded as a permissible interpretation of the Executive Order, it could nevertheless have force as an independent regulation deriving its statutory support from the amendment of Section 5 (b), on December 18, 1941, by the First War Powers Act, 1941 (App., pp. 57–58). By that amendment, the Congress conferred upon the President the enlarged powers to "regulate, * * * nullify, void, prevent or prohibit, * * * any acquisition holding * * * transfer * * * of, or dealing in * * * or transactions involving, any property in which any foreign country or a national thereof has any interest." General ruling No. 12 recites that it was issued "by direction of

Accordingly, we submit that the Ruling is entitled to great weight as a construction of the scope of the Executive Order by the agency administering the provisions of the Order and expert in its meaning. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140; *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 549; *Boutell* v. *Walling*, 327 U. S. 463, 471.[26]

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the President." Moreover, full authority under the amended Section 5 (b) had been delegated to the Secretary of the Treasury. Section 2, Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, and the letter of the same date from the Alien Property Custodian to the Secretary of the Treasury, 7 F. R. 2115. See *United States* v. *Leiner* 143 F. 2d 298, 299 (C. A. 2, 1944). Compare Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, Secs. 3, 12. The Ruling may, therefore, be regarded as an independent, retroactive nullification of transactions intended to be prohibited by the Executive Order, such as, in this case, the vesting of title to A. K. M.'s asset in the petitioner by his appointment as permanent receiver on September 29, 1941.

We submit that there can be no doubt of the constitutional power, in time of war, thus to "nullify" transactions which took place after the effective date of the Executive Order where, as here, the transaction was within the plain intendment of that Order, even though it may be thought not explicitly prohibited by the Order's terms. Cf. *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38; *Milliken* v. *United States*, 283 U. S. 15, 23; *Illinois Central R. R. Co.* v. *Minnesota*, 309 U. S. 157, 164–5; *Lichter* v. *United States*, 334 U. S. 742, 799–9; *Fleming* v. *Rhodes*, 331 U. S. 100.

[26] From the inception of freezing controls on April 10, 1940, until September 30, 1948, the administration of freezing controls, including the authority to issue licenses, was in the Secretary of the Treasury (5 F. R. 1400). Effective on the latter date, the authority was transferred to the Attorney General in so far as it related to property then blocked (Executive Order No. 9989, Aug. 20, 1948, 13 F. R. 4891). Prior

The petitioner has apparently abandoned the contention, rejected below (II R. 44–45), that a transfer to him was nevertheless permitted by paragraph 4 of the General Ruling (App., pp. 63–64). He makes the same argument in substance, however, by his reliance on certain statements in Government briefs and stipulations in other cases (Brief, pp. 50–53). Those statements, based on the principles of Paragraph 4 of the Ruling, are to the effect that there is no inconsistency between the Executive Order and the exercise of jurisdiction by a state court by means of an attachment which would create no lien or rights in the property. This has been the oft-stated position of the Treasury, dictated by a desire not to "forbid" or interfere with the bringing of litigation in the courts. Thus, Paragraph (4) of General Ruling No. 12 provides that transfers by judicial action shall be determinative of the rights of the parties to the judicial proceedings, with the explicitly stated proviso that the judicial process shall not create "a greater right * * * than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate

to this transfer, the Secretary of the Treasury had, upon the vesting of property by the Alien Property Custodian or the Attorney General as his successor, released to the Custodian or the Attorney General all authority under the Trading with the Enemy Act with respect to the property so vested. See Sec. 2, Executive Order No. 9193, July 6, 1942, 7 F. R. 5205; *Cf.* General Ruling No. 19, issued by the Treasury Department, as amended August 2, 1946, 10 F. R. 14775, 11 F. R. 8350.

license." A purported voluntary assignment by either A. K. M. or ASCAP to the petitioner, on or after June 14, 1941, would plainly have been ineffective, in the absence of a Treasury license, to give the petitioner any interest in the property. Consequently, the judicial appointment of the petitioner as receiver was equally ineffective.

The narrow purpose of Paragraph 4 of the Ruling—to permit litigation without allowing the unlicensed creation or transfer of any interests in blocked property by judicial process—has been repeatedly stated by the Government and widely understood by the bar. See Press Release No. 34, April 21, 1942, U. S. Treasury Department, *Documents Pertaining to Foreign Funds Control* (1946), pp. 71, 73;[27] Public Circular No. 31, August 2, 1946, 11 F. R. 8351, App., pp. 67–68; letter by Randolph E. Paul, General Counsel of the Treasury Department, published in *American Banker,* December 11, 1942, p. 3,

[27] "Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties."

col. 2; Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947); Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Problems, 17, 44–49 (1945); and Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180, 2200 (1945).

D. TO CONSTRUE THE FREEZING REGULATIONS AS PERMITTING AN UNLICENSED TRANSFER OF AN INTEREST IN BLOCKED PROPERTY, AND AS MERELY PROHIBITING PAYMENT, WOULD DEFEAT THE PURPOSE OF FREEZING CONTROLS

As already noted, the freezing program was instituted in April of 1940 primarily for the protection of the property in the United States of nationals of countries overrun by the Axis. It continued after our entry into the war as one of the major weapons of the United States in waging economic warfare against the Axis. See U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 1–4.

The petitioner misplaces his reliance (Brief pp. 43–47) on the legislative history of the amendment to Section 5 (b) of the Act contained in the Joint Resolution of May 7, 1940 (App., pp. 56–57), as showing an intention not to prohibit all unlicensed transfers. The Committee reports shed little light on the question now in issue. See S. Rep. No. 1496, 76th Cong., 3d Sess.; H. Rep. No. 2009, 76th Cong., 3d Sess.

During the relatively brief debates, while individual Senators[28] adverted to the most pressing instance of the transfers to be prohibited—those coerced by the Germans—there was full appreciation that transfers generally would be prohibited, except as licensed, and that control would be exercised by the prevention of changes in title, and not merely prevention of payment. Thus, Senator Connally stated (86 Cong. Rec. 5179):

> *The matter involved is the title and ownership to the property affected.* Whether it be a stock certificate, or a check, or a piece of money, it is all property. *The object is to give the Government some power of regulation and control over the transfer of ownership.* [Italics supplied.]

The following colloquy between Senator Connally and Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out the Resolution, indicates the understanding that not merely payment, but *any* changes of title were to be prohibited (86 Cong. Rec. 5007):

> *Mr. Connally.* And is not this measure for the purpose of *preventing change of title* of the property here in the United States by conquest, or by any other forcible or violent means?

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[28] There were apparently no debates in the House. See 86 Cong. Rec. 5335–6; 5468, 5519. The debates in the Senate are found at 86 Cong. Rec. 5006–5, 5103, 5168–5184.

> *Mr. Wagner.* That is exactly the purpose. [Italics supplied.]

Senator Danaher, moreover, called attention to the broad scope of the Treasury definition of "property," transfers of which were to be regulated by the Treasury under the Executive Order (86 Cong. Rec. 5177). And Senator Wagner's comments indicated, as was the case under the Order, that transactions would be generally prohibited and then permitted under license (86 Cong. Rec. 5007):

> Under the proposed law the United States Government would inquire into the reason for the transfer, the circumstances under which it was asked. If we found that it was the result of duress, we would refuse to grant a license. It is a protective measure.

The petitioner relies on Senator Wagner's later remarks to the effect that the Joint Resolution "does not absolutely prohibit" the transfers or the transactions (86 Cong. Rec. 5175, 5176). It is clear from the context that the Senator meant simply that the Joint Resolution contemplated a prohibition in the first instance, and, thereafter, the issuance of a license in appoved cases. He did not mean, or say, that the Order or the resolution banned only payments, or were otherwise restricted in their coverage. Moreover, the text of the Joint Resolution is clear; the President was authorized to "investigate, regulate, or

prohibit" transactions described substantially in the words of Executive Order No. 8389, as it was issued April 10, 1940, and as it was amended on June 14, 1941 (App. pp. 56–57, 59–60). And by Section 2 of the Joint Resolution, Congress explicitly ratified the 1940 Executive Order, and the regulations issued thereunder (App., p. 57).

The legislative understanding of the scope of the freezing controls was reflected in perhaps a more comprehensive manner in the committee reports on the First War Powers Act, 1941, which ratified the 1941 amendments to the Executive Order and further amended Section 5 (b) of the Act (App. pp. 57–58). The House Committee on the Judiciary stated (H. Rep. 1507, 77th Cong., 1st Sess., p. 3):

> At present the Government exercises supervision over transactions in foreign property, either by prohibiting such transactions or by permitting them on condition and under license. It is, therefore, a system which can prevent transactions in foreign property prejudicial to the best interest of the United States, * * *

Like statements were made by the Senate Committee. See S. Rep. 911, 77th Cong., 1st Sess., p. 2.

These legislative materials, we submit, clearly reflect the Congressional intention to prevent all changes of ownership of foreign property, except as licensed. Powers thus broad were necessary

to the achievement of the objectives of the freezing program. See U. S. Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government (1942)*, pp. 1–4, and *passim;* Press Releases No. 1, June 14, 1941 and No. 34, April 21, 1942, U. S. Treasury Department, *Documents Pertaining to Foreign Funds Control (1946)*, pp. 64, 71, 72. That this is so may be shown by a few illustrations.

1. One of the primary objectives of freezing control was to protect the property of persons in countries overrun by the Axis from the various forms of looting in which the Axis notoriously engaged. If a coerced transfer of property could be effective to transfer title, and the freezing regulations merely prevented payment or delivery to the transferee, the transfer would effectively deprive the former owner of all interest in the property. The transfer being valid, the transferee would be the owner and the bank or other holder of the property could not respect any directions of the transferor with respect to it. A freezing program which merely prevented payment would thus be ineffective against Axis looting.

2. An even more important objective, especially after the outbreak of the war, was that of preventing the Axis from using property in the United States as a means of obtaining credit and foreign exchange to support its war effort. A freezing program which permitted transfers of

title to securities, bank accounts, and other assets in the United States, would have been inadequate to prevent the enemy from benefiting from those assets. The Axis could acquire dollar assets with no greater effort than the pointing of a gun or the exaction of "occupation costs." Having thus acquired title to blocked dollar assets, the Axis could readily have sold them at a discount to neutral speculators in order to obtain currencies of neutral countries. Those currencies would have paid for deliveries of needed commodities; they would also have financed espionage, sabotage, and propaganda. If such a sale passed good title, the purchaser would be assured that no one else could be recognized as the owner of the property, and would have a substantial expectation of being able to realize on the property upon the eventual relaxation of the freezing controls. Under those circumstances, trading in blocked dollar assets at an appropriate discount might well be an attractive venture. If, on the other hand, the purchaser got no title but only the possibility of acquiring title if he could obtain a license, the attractiveness of such trading in blocked accounts would be very greatly diminished.

The greatest success of the freezing controls was that transfers of this sort were discouraged through fears of their efficacy. If this Court should now hold that unlicensed transfers may carry title, those who in cooperation with the Axis gambled by speculating in blocked assets would

be rewarded by securing good title to those assets. And if such speculators were thus allowed to profit in this war, the *in terrorem* effect of any similar controls that might be required in the future would be lessened.

3. The freezing controls, by preventing unlicensed transfers of foreign property, also made it more difficult for enemy property to escape the vesting program. Much actual enemy property was ostensibly owned by neutrals. If those neutrals had been free to transfer ostensible ownership of the property before it could be vested, they might before the war have rendered it impossible to trace it back to its original enemy ownership. A decision that an unlicensed transfer passes title to such property would greatly increase the chance of success of such attempts of actual enemies to conceal their property.

The foregoing illustrations sufficiently indicate, we believe, that a holding that frozen foreign property may be transferred without the license of the Treasury Department would seriously impair the effectiveness of the national program of freezing controls. It is equally clear, as was pointed out by the court below, that the prohibition must extend to judicial as well as voluntary transfers. The purpose of Congress was to place *all* transfers of foreign property under federal supervision. To permit parties to escape that supervision by the use of judicial process would furnish an easy means of evasion through

the entry of judgments by consent or default. Even in the absence of any purpose of evasion, to permit rights to be acquired as a result of judicial action without any supervision on the part of the federal agencies charged with administering the freezing program, would render impossible any consistent and centralized administration of that program. *Supra* pp. 19–20.[29]

E. THE JUDICIAL CONSTRUCTION OF THE ORDER

The conclusion reached by the Court of Appeals, and reaffirmed by that court in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, C. A. 2, No. 141, October Term, 1948, February 21, 1949, slip opinion, pp. 839–40, is in accordance with the decisions of the other federal courts which have had occasion to consider the problem. Without exception, those courts have disregarded rights claimed to have been acquired by unlicensed judicial action such as the levy of attachments, and

[29] The petitioner contends that the receiver's administration of A. K. M.'s assets, including the debt in suit, will serve the interests of A. K. M.'s creditors better than would the system of freezing controls. But freezing controls do not, and have not, involved any disposition of the blocked assets; as the popular name connotes, they merely provide for the freezing or supervision of transactions involving the assets until a federal license is granted. After the frozen property here involved was vested by the Alien Property Custodian, however, the claims of American creditors were protected by the Trading with the Enemy Act, which furnishes an exclusive and adequate remedy for creditors. Sec. 34, 60 Stat. 925, 50 U. S. C. App. 34; *Cabell* v. *Markham*, 69 F. Supp. 640 (S. D. N. Y.).

have refused to recognize or enforce rights claimed to have been acquired by unlicensed private transactions. *Clark* v. *Chase National Bank* and *Clark* v. *Federal Reserve Bank*, unreported, S. D. N. Y., Cir. No. 44-618, 1948, denied all force to asserted liens based upon unlicensed attachments of blocked property. In *Okihara* v. *Clark*, 71 F. Supp. 319 (D. Hawaii), an unlicensed deed of land was held ineffective. In *Heyden Chemical Co.* v. *Clark*, unreported, S. D. N. Y., Cir. No. 37-548, 1948, it was held that an unlicensed agreement to transfer stock conferred no rights on the intended transferee. See also, *The Kotkas*, 35 F. Supp. 983, 985 (E. D. N. Y.); *Blank* v. *Clark*, 79 F. Supp. 373 (E. D. Pa.).

Among state courts, only those of New York have construed the Executive Order. These courts have expressed a different view of the effect of the Order than have the federal courts. In the first case to come before the New York Court of Appeals, *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345, that court sustained the exercise of jurisdiction over a nonresident defendant by an attachment of its funds within the state, an attachment made without a license issued under Executive Order No. 8389. In so doing, however, the New York court rejected the view, adopted by the lower state courts, that the effect of the Executive Order was to forbid payment and not the assignment of a

claim or property. The New York Court of Appeals appears to have held, in accordance with the suggestion made to it by the United States as *amicus curiae*, that no conflict with the Executive Order would result from the exercise of jurisdiction by the state court through the recognition of an attachment which would create no lien and be subject to federal license. See pp. 28–30, *supra*; Paragraph 4, General Ruling No. 12 (App., pp. 63–64). In *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E. 2d 726, however, the same court held that the plaintiff was entitled to go to trial on the question of the rights acquired by it by a transfer of credit which was prohibited by the Executive Order. The court seems to have taken the view that by reason of the provisions of paragraph 4 of General Ruling No. 12, courts are authorized to enter judgment declaring unconditionally that rights and obligations have been created by unlicensed transactions, with the single qualification that the freezing regulations prevent payment of such judgments without a federal license. The question was recently reargued before the New York Court of Appeals on an appeal from a judgment made after trial in the *Singer* case, and is presently *sub judice*.

A number of other cases in New York seem to have held, similarly, that judicial action may create or give recognition to enforceable rights in

blocked property, subject only to the requirement of a federal license prior to payment or physical transfer of possession.[30] Still other New York cases, however, have held, consistently with the decision below, that private transfers of interests in blocked property are prohibited.[31]

The Court of Appeals for the Second Circuit recognized that its decision was in conflict with that of the New York Court of Appeals in *Singer* v. *Yokohama Specie Bank* and expressly repudiated the New York court's decision, both in the opinion below (II R. 45) and again, more recently, in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, C. A. 2, No. 141, October Term, 1948, February 21, 1949, slip opinion, pp. 839–40. For the reasons already indicated, we think it clear that the decision below was compelled by the terms of the Order and the regulations.

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[30] See, e. g., *Leeds* v. *Guaranty Trust Co.*, 65 N. Y. S. 2d 431 (Sup. Ct., N. Y. Co.), affirmed, 272 App. Div. 909, 72 N. Y. S. 2d 409 (1st Dept.), affirmed, 297 N. Y. 1019, 80 N. E. 2d 538; *Cable & Wireless Ltd.* v. *Yokohama Specie Bank*, 191 Misc. 567, 79 N. Y. S. 2d 597 (Sup. Ct. N. Y. Co.); *Metallo-Chemical Corp.* v. *Banque Transatlantique*, 188 Misc. 596 (City Ct. N. Y. Co.); *Drewry* v. *Onassis*, 188 Misc. 912, 69 N. Y. S. 2d 850, affirmed, 272 App. Div. 870, 72 N. Y. S. 2d 262 (1st Dept.); *R. & L. Goldmuntz Sprl* v. *Fischer*, 54 N. Y. S. 2d 635 (Sup. Ct. N. Y. Co.).

[31] *Patino* v. *Patino*, 186 Misc. 381, 59 N. Y. S. 2d 58 (Sup. Ct., N. Y. Co.); *Philipp* v. *Chase Nat. Bank*, 34 N. Y. S. 2d 465 (Sup. Ct., N. Y. Co.); *In re Giovanozzi's Estate*, 57 N. Y. S. 2d 528 (Surr. Ct., N. Y. Co.); *Koninklijke Lederfabriek, etc.* v. *Chase Nat. Bank*, 177 Misc. 186, 30 N. Y. S. 2d 518 (Sup. Ct., N. Y. Co), affirmed, 263 App. Div. 815, 32 N. Y. S. 2d 131 (1st Dept.).

II

THE PETITIONER DID NOT ACQUIRE TITLE TO THE FUND BY HIS APPOINTMENT AS TEMPORARY RECEIVER TWO DAYS BEFORE THE DATE ON WHICH THE FREEZING REGULATIONS WERE APPLIED TO PROPERTY OF AUSTRIAN NATIONALS

In Point I, *supra*, we have shown that if petitioner did not have title to the funds in suit prior to June 14, 1941, nothing that occurred on or after that date could be effective, in view of the absence of a federal license, to give him title. Petitioner argues, however, that he acquired title, or that the New York court took custody of *in rem* rights to A. K. M.'s claim against ASCAP, on the petitioner's appointment as temporary receiver on June 12, 1941, prior to the effective date of the freezing controls.

1. The question of petitioner's rights as temporary receiver has been determined, adversely to the petitioner, by both the lower courts (I R. 146–147; II R. 43–44). The issue is a narrow question of construction of a New York statute which has been given full consideration by the courts below, composed of judges of long experience in that law. As the precise question of state law is novel, it cannot be urged that there has been a departure from the state law requiring the supervisory action of this Court.[32] In these cir-

[32] The Court of Appeals properly rejected the suggestion that it refer the case, together with the important federal questions involved, to the state courts. *Markham* v. *Allen*,

cumstances the decisions below should stand. *MacGregor* v. *State Mutual Co.*, 315 U. S. 280; *Helvering* v. *Stuart*, 317 U. S. 154; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708.

2. Moreover, an examination of the statute, Section 977–b, New York Civil Practice Act (App. pp. 71–80) shows that the courts below were clearly correct in holding that petitioner took no title by his appointment as temporary receiver. Without support in the statute, petitioner's claim to title must concededly fail, but that support cannot be summoned by reading isolated provisions out of their context. Instead, these provisions must be fitted into and read in the light of the statutory scheme as a whole.

Thus read, the text and general scheme of the statute demonstrate that the temporary receiver takes no title. The act sets out, in logical order and in detail, the provisions for receiverships of

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326 U. S. 490; *Meredith* v. *Winter Haven*, 320 U. S. 228. The Court of Appeals pointed out (II R. 45–46) that cases in which questions of state law have been referred to the state courts, such as *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; and *Musser* v. *Utah*, 333 U. S. 95 (cited by the petitioner, Brief, p. 21), are based on this Court's reluctance unnecessarily to decide constitutional, and similarly delicate, questions. They are inapplicable here, where "unusually important federal rights" are involved (II R. 46), and there is no constitutional issue

foreign corporations where they have been dissolved, had their charters annulled, or ceased to do business. Subdivision 1 authorizes an action for the appointment of a receiver under these circumstances. Any creditor may bring the suit (subd. 2) and service may be made in person or by publication (subd. 3). Subdivision 4 provides that, if personal service within the state cannot be effected, the plaintiff may apply *ex parte*, on specified papers, for the appointment of a "temporary receiver pending the determination of the action," who shall file such an undertaking as the Court directs and "who * * * shall take, receive and reduce to his possession" any assets of the foreign corporation and "hold the same until the further order of the court." [33] It was pursuant to this subdivision that on June 12, 1941, the petitioner was appointed temporary receiver of the assets

[33] A temporary receiver *must* be appointed, where personal service cannot be effected on the defendant corporation, on the filing of a verified complaint *alleging* that the corporation has been dissolved, annulled, or ceased to do business. No trial, or preliminary determination, of the issue of dissolution is had prior to the appointment of the temporary receiver, Subd. 4, App. p. 72. The conclusion of the courts below that no title passed on the petitioner's appointment as temporary receiver is the more supported by the unlikelihood that it was intended that title pass in an *ex parte* proceeding, on no more than an allegation of the requisite facts, and by the lack of necessity that a temporary receiver acquire more than a right to possesion in order to perform his statutory duties.

of A. K. M. and directed to reduce to possession its assets in New York [34] (I R. 49–51).

The statute further provides that after the service of a copy of the order of appointment and a demand made on a person who holds corporate property or against whom a claim in favor of the corporation exists, an order may be made for service by publication (subd. 5). The nature of the publication is specified (subd. 6); it must be begun within sixty days of the appointment of the temporary receiver (subd. 7). Service of the summons shall be deemed complete within ten days after the date of the last publication; the action is deemed commenced upon the issuance of summons (subd. 8). If an answer is made, the case may be set down on the preferred calendar (subd. 9). On default (or after trial and findings that the corporation has ceased to do business,

[34] A preliminary difficulty with petitioner's argument that he took title before June 14, 1941, is that the record does not show that he qualified as temporary receiver before that date. The order appointing him temporary receiver, dated June 12, 1941, provided that he should "before entering upon the duties of his trust" execute and file a bond in a specified amount (I R. 50). While it appears that petitioner qualified as temporary receiver some time on or before July 7, 1941 (I R. 52–55), the petitioner adduced no evidence to show, and has at no time alleged, that he so qualified on either June 12 or June 13. It is settled law in New York that no rights pass to a receiver until he files the required bond. *Moran* v. *Sturges*, 154 U. S. 256 (dealing with New York law); *Smith* v. *Nannen*, 231 App. Div. 234, 247 N. Y. Supp. 47 (1st Dept.); *Edgerly* v. *Blackburn*, 140 App. Div. 419, 125 N. Y. Supp. 353 (1st Dept.).

been dissolved, liquidated, nationalized, or annulled) the court must enter judgment appointing a permanent receiver (subd. 10).

In contrast to the temporary receiver, who by Subdivision 4 is directed merely to reduce assets to possession and hold them until further order of the court, the permanent receiver is, under Subdivision 10, to "liquidate" the assets and to that end is to reduce them to cash, give notice to creditors requiring them to prove their claims within a set time (subd. 11), allow or disallow claims, submit accounts to the court and make distributions to creditors (subds. 13–17). The statute of limitations is the subject of Subdivision 18. Subdivision 19 provides for the powers of the permanent receiver, and Subdivision 12 generally for the additional powers of receivers. The petitioner relies on both Subdivisions 12 and 19.

Subdivision 19 provides that title to all assets shall vest in "the receiver" upon the making of the order appointing him. Read in its context, this subdivision clearly relates only to the permanent receiver, whose appointment, powers and duties are specified in Subdivisions 10–11 and 13–17.[35] Those subdivisions, after the initial mention of the permanent receiver in Subdivision 10, consistently refer to such a receiver as "the re-

[35] Subdivision 12 relates to "any receiver" and is discussed below (pp. 47–48). Subdivision 18 relates to the suspension of the statute of limitations. It is of general applicability, and refers to the time of the appointment of "a" receiver.

ceiver." As has been seen, the plan of the statute is plainly chronological. The nature of the action, the method of service, the appointment of the temporary receiver, and matters relating to the trial of the foreign corporation's status are dealt with in Subdivisions 1–9. Subdivision 10 begins, so to speak, a new chapter by its provision for final judgment appointing the permanent receiver.

That Subdivision 19 relates only to the permanent receiver is confirmed by Subdivision 4, which authorizes the appointment of the temporary receiver and contains the sole specification of his duties to be found in the statute. The temporary receiver "shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court." These words were repeated in the order appointing the petitioner (I R. 50). There is nothing in this statement of the duties of the petitioner which would make it appropriate that he take title to the corporate assets. When Subdivision 4, giving the temporary receiver a right to possession only, is read with Subdivision 19, giving the permanent receiver title, it becomes clear that Subdivision 4 implicitly denies title to the temporary receiver. Furthermore, since the temporary receiver must be appointed without proof of the facts justifying the receivership, without notice to the corporation, and with no room for the exercise of the court's discretion (*supra*, p. 43), it is most unlikely that

such appointment was intended to invest the receiver automatically with title to all of the corporation's assets.

Appellant relies also upon Subdivision 12, which provides:

> Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

The difficulty with the argument based on this subdivision is that it overlooks the phrase "in addition to those herein provided for," as well as the express provisions of Subdivision 4. Of the argument based on Subdivision 12 the Court of Appeals said (II R. 43–44):

> Appellant reasons that "any receiver" includes a temporary one and accordingly that he has the powers of a permanent receiver. We think his argument proves too much. Subd. 4 defines the temporary receiver's powers and states that he can reduce the property to possession. It does not even suggest that he takes title. Clearly there would be little purpose in spelling out restricted powers there if the later subdivision was intended to make them unlimited. To do so would set at naught the distinction between a temporary and permanent receiver so obviously intended by the language of the statute. More readily the quoted language should

be read to mean that a temporary receiver under this provision takes the usual powers of other temporary receivers in New York.

3. By an argument not advanced below, the petitioner seeks now to establish (Brief, pp. 17–21) that, quite apart from the provisions of Subdivisions 12 and 19, title vested in him as temporary receiver as part of the plan of the statute for the exercise of *in rem* jurisdiction over the assets of the defendant corporation. Aside from the question of the permissibility of an "interference" by the federal courts with state court jurisdiction *in rem* (*infra*, pp. 53–55), it is plain that such jurisdiction was not here exercised by the state court, prior to June 14, 1941.

The petitioner urges that under Section 977–b, the court gains its *in rem* jurisdiction to liquidate the foreign corporation's assets by two acts only—the appointment of a temporary receiver and service by publication—and that constructive service would be totally ineffective, under the jurisdictional requirements of the Fourteenth Amendment, to confer jurisdiction if the prior appointment of the temporary receiver did not amount to a seizure and vesting in him of the corporation's assets. By petitioner's appointment, he argues, the state court necessarily took custody or possession of A. K. M.'s assets, and, therefore, the courts below either wrested this possession from the state court, or must be taken to have held that the statute failed, because of

a constitutional bar, to achieve *in rem* jurisdiction in the state court by constructive service.

The fatal defect of this argument is the omission, in the statement of the prerequisites for constructive service, of a most significant requirement, intermediate between the appointment of the temporary receiver (subd. 4), and the order directing service by publication (subd. 5). The omitted requirement is that before service by publication may be authorized, a demand must be made by the temporary receiver upon a person holding property of the corporation or against whom there is a claim by the corporation (subd. 5), in this case, upon ASCAP. The demand, by the provisions of Subdivisions 20, is the method by which possession of assets is obtained. It is thus clear that the constructive service, and the *in rem* jurisdiction contemplated by the statute, rest not on the mere appointment of the receiver, but rather on the possession by the temporary receiver of tangible or intangible property within the state, a possession obtained by the service of a demand upon the person holding the property.[36] In this case, the only asset of A. K. M. was the claim against ASCAP, and the requisite demand was not served upon ASCAP until July 9, 1941 (I R. 76, 96, 52–55),

[36] The action is not deemed commenced until the issuance of the summons (subd. 8) which occurs after the temporary receiver's service of a demand for the corporation's assets (subd. 5).

almost a month after freezing controls became effective on June 14, 1941. Accordingly, custody or *in rem* jurisdiction was never achieved.

4. The holding of the Court of Appeals conforms to the general rule in New York, derived from equity practice and applied as well to statutory receiverships, that a temporary receiver does not take title to any assets but merely acquires a right to possession. *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396; *Decker* v. *Gardner*, 124 N. Y. 334, 26 N. E. 814; *Mutual Brewing Co.* v. *New York & College Point Ferry Co.*, 16 App. Div. 149, 45 N. Y. Supp. 101 (2d Dept.); *In re French*, 181 App. Div. 719, 168 N. Y. Supp. 988 (1st Dept.), affirmed, 224 N. Y. 555, 120 N. E. 863; *Stokes* v. *Hoffman House*, 167 N. Y. 554, 60 N. E. 667; *Mercantile Trust Co.* v. *Kings Co. El. Ry. Co.*, 40 App. Div. 141, 57 N. Y. Supp. 892 (2d Dept.); *Metropolitan Life Ins. Co.* v. *Sanborn*, 34 Misc. 531, 69 N. Y. Supp. 1009 (Sup. Ct. App. Term). See 2 Clark, *Receivers* (1929), Sec. 718. Cf. N. Y. General Corporation Law, Secs. 110, 162, 163, 168.[37] The same rule prevails in other jurisdictions. See Alderson, *Receivers* (1905), Secs. 4, 188.

Since the decision below, the petitioner has found a New York case containing language which taken from context, seems to point the

[37] Comparisons between equity and statutory receivers in the early cases may be misleading for the reason that prior to 1880 there were no temporary statutory receivers. Statu-

other way, *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42, 45, 44 N. E. 944, 945. (It should be noted that neither this case, nor the cases cited above which present the general law of New York, were decided under Sec. 977-b of the New York Civil Practice Act (App., pp. 71–80); the statute pursuant to which the petitioner was appointed.) The *Nealis* case was a suit by a temporary receiver based on a fraudulent conveyance by the insolvent corporation in receivership. The court rejected the defense that the receiver was required to join the corporation as a defendant. Such joinder, the court said,

> would be inconsistent with the appointment of the temporary receiver, who for the purposes of holding, protecting and reducing to possession the property and assets of the company, is vested with title * * * [150 N. Y. at 45, 44 N. E. at 45].

It is clear that the court was using the word title loosely, in the sense of the receiver's statutory authority to reduce assets to possession and to

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tory receivers corresponded to the present permanent receivers and took title. New York Rev. Stat. pt. 3, c. 8, tit. 4, art 3, secs 66–68, 3 N. Y. Rev. Stat. (6th ed. 1875), p. 754. See *Herring* v. *New York, L. E. & W. R. Co.*, 105 N. Y. 340, 371, 372–373, 375–379, 389–390, 12 N. E. 763, 773, 774, 775, 777, 782; Note, 19 Abbott's New Cases (N. Y.) 359.

The first statutory provisions for temporary receivers appeared in 1880 and 1889. N. Y. Laws 1880, Ch. 178, Code of Civil Procedure, Secs. 1788–89; N. Y. Laws 1889, Ch. 314, Code of Civil Procedure, Sec. 2423. These provisions are now in substance contained in Secs. 110, 162, N. Y. General Corporation Law.

bring suits.[38] In the course of its opinion the court stressed this aspect, and said that the policy of the statute there involved required that "title of the corporate property should be vested in an officer of the court who has full authority to reduce it to possession wherever found and to maintain any action or special proceeding necessary in the premises" (150 N. Y. at 45, 44 N. E. at 945). Indeed, the statute involved explicitly gave the receiver such authority. N. Y. Laws 1880, Ch. 178, Code of Civil Procedure, Sec. 1788,

[38] Other New York cases, also cited by the petitioner for the first time (Brief, p. 28) are equally irrelevant. Thus, in *Johnson* v. *Rayner*, 25 App. Div. 598, 599–600, 49 N. Y. Supp. 959, 960 (1st Dept.), the temporary receiver had been authorized by the Court to sell, doubtless in pursuance of Sec. 2423, Code of Civil Procedure (*supra*, fn. 37) which authorizes the grant to the temporary receiver of the additional powers of the permanent receiver. Accordingly, a sale by him was upheld. As in *Nealis* v. *American Tube & Iron Co.*, the reference to the title of the temporary receiver was in the sense of his authority to carry out the functions explicitly assigned to him. See *infra*, p. 53, fn. 39. In *Frank* v. *Lutton*, 267 App. Div. 703, 48 N. Y. S. 2d 137 (3d Dept.), in the course of supplementary proceedings for the collection of a judgment, the judgment creditor obtained the appointment of a receiver under Section 807, Civil Practice Act. That section, as in the case of the pre-1880 statutes (*supra*, fn. 37) makes no distinction between a temporary and permanent receiver; the property of the judgment debtor "is vested in a receiver." *Prince* v. *Schlesinger*, 116 App. Div. 300, 101 N. Y. Supp. 1031 (1st Dept.), involves a permanent statutory receiver. *Nat. Park Bank* v. *Clark*, 92 App. Div. 262, 87 N. Y. Supp. 185 (1st Dept.) determined that an attachment took precedence over the rights of an ancillary, temporary receiver subsequently appointed.

see fn. 37, *supra*. It is significant that in three cases decided after 1896, the year of the decision in the *Nealis* case, the New York courts held that a temporary receiver under the same statute did not acquire general title. *Mutual Brewing Co.* v. *New York & College Point Ferry Co.*, 16 App. Div. 149, 45 N. Y. S. 101 (2d Dept. 1897); *Metropolitan Life Ins. Co.* v. *Sanborn*, 34 Misc. 531, 69 N. Y. S. 1009 (Sup. Ct., App. Term); *In re French*, 181 App. Div. 719, 168 N. Y. S. 988 (1st Dept.), affirmed, 224 N. Y. 555, 120 N. E. 863; but *cf. Johnson* v. *Rayner*, 25 App. Div. 598, 49 N. Y. Supp. 959, 960–1 (1st Dept.); *Matter of Simth Co.*, 31 App. Div. 39, 41–2, 52 N. Y. Supp. 877, 883–4, (1st Dept.) [39]

5. The petitioner further claims (Brief, pp. 17–21) that the decision below is an interference with the *in rem* jurisdiction or custody of the state court.[40] We have already shown (pp. 28–30, *supra*) that such *in rem* jurisdiction was not sought to be exercised until after the institution of freezing controls, and that it was, therefore, inoperative.

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[39] While the language in these cases is to the effect that the temporary receiver takes title, as in *Nealis* the use of the word "title" was in the sense of the receiver's right or authority to carry out his statutory functions of preserving the property in his possession.

[40] The petitioner makes this contention, although a variant of this question appears to have been raised by the fourth question in the petition for writ of certiorari (Pet., p. 7), which is not within the limited grant of the writ (*supra*, p. 2).

Even assuming that *in rem* jurisdiction or possession of the claim against ASCAP was obtained, it is, as the court below observed, a fallacy to suggest that it is decisive (II R. 46). There has been no interference either with the administration of the receiver's affairs or with assets physically in the hands of the receiver or of the state court. Indeed, the actual funds in suit are held neither by the state court nor the petitioner, its receiver, but rather by ASCAP, a third party. The Custodian has sought, as is his unquestioned right, the aid of the federal courts to enforce an order under the Trading with the Enemy Act. Sec. 17, 40 Stat. 411, 50 U. S. C. App. 17; *Markham* v. *Allen*, 326 U. S. 490. He joined the petitioner as a defendant merely because the petitioner was asserting a claim to the same assets. The Custodian has never sought a judgment requiring the petitioner or any other officer of the state court to pay anything over to him, and the judgment here appealed from does not do so. As against the petitioner the Custodian has sought and has been granted below, only an adjudication of their respective rights to the funds in the hands of ASCAP (I R. 153).

The position of the Custodian here is even stronger than it was in *Markham* v. *Allen, supra*. There the federal courts undertook to determine ultimate rights in a fund actually in the hands of and being administered by a state court. Here, the federal courts have determined rights of the

Custodian to a fund in the hands of a third party. The suggestion is untenable that merely because another claimant to that fund happens to be a state receiver the federal courts are deprived of jurisdiction over this federal cause of action. Cf. *Fischer* v. *American United Ins. Co.*, 314 U. S. 549.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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MARCH 1949.

APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency; and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision

has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq.:

* * * * *

SEC. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving,

any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

3. First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840:

* * * * *

SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

* * * * *

4. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarkings of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

* * * * *

(j) June 14, 1941—

* * * * *

Austria

* * * * *

SEC. 5.

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E. The term "national" shall include,

* * * * *

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such

effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

* * * * *

F. The term "banking institution" as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of his business, or brokers; and, each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate "banking institution."

* * * * *

SEC. 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application of license shall be final.

* * * * *

5. General Ruling No. 4, June 3, 1940, 5 F. R. 2133, as amended, May 24, 1941, 6 F. R. 2584:

> Except as specifically provided herein or otherwise, all definitions appearing in Executive Order No. 6560 of January 15, 1934, as amended by Executive Order No. 8389 of April 10, 1940, as amended, and the Regulations issued thereunder, shall apply to the terms employed in all rulings, licenses, instructions, etc., and, in addition, the following definitions and rules of interpretation are prescribed:
>
> (1) The term "Order" shall mean Executive Order No. 8389, as amended.
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> * * * * *
>
> (4) The term "blocked country" shall mean any foreign country designated in the Order.
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> * * * * * *
>
> (8) The term "blocked account" shall mean an account in which any blocked country or national thereof has an interest, with respect to which account payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to a license authorizing such action. The term "blocked account" shall not be deemed to include free dollar accounts of the type referred to in General License No. 32, as amended, or the accounts of generally licensed nationals.
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> * * * * *

6. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

> (1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and

void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and

liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided, however,*

That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

(c) The term "blocked account" shall refer to a blocked account (including safe deposit box) of a party to the transfer and shall have the meaning prescribed in General Ruling No. 4 except that it shall not be deemed to include an account not treated as a blocked account by the person with whom such account is held or maintained.

(d) The term "effective date of the Order" shall have the meaning prescribed in General Ruling No. 4 except that "the effective date of the Order" as applied to any person whose name appears on The Proclaimed List of Certain Blocked Nationals shall be the date upon which the name of such person first appeared on such list.

(e) The term "transfer by operation of law" shall be deemed only to mean any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status; any transfer to any person by intestate succession; any transfer to any person as admin-

istrator, executor, or other fiduciary by reason of any testamentary disposition; any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession; and any transfer pursuant to (i) Netherlands Royal Decree of May 24, 1940, and (ii) Norwegian Provisional Decree of April 22, 1940, concerning the monetary system, etc.

(6) Nothing contained in this general ruling shall be deemed to affect in any way criminal liability for violation of the Order, or the regulations, rulings, circulars, or instructions issued thereunder, or in connection therewith, or to otherwise modify any provision thereof.

By direction of the President.

7. Public Circular No. 31, August 2, 1946, 11 F. R. 8351:

(1) Reference is made to General Ruling No. 12 relating to unlicensed transfers of blocked property. Reference is also made to General Ruling No. 19 relating to the release of Treasury controls over property vested by the Alien Property Custodian. This circular deals with the effect of such release on unlicensed attachments levied with respect to blocked property prior to the vesting thereof by the Custodian.

(2) Under paragraph (1) of General Ruling No. 12, interests in blocked property cannot be acquired, transferred, or created by unlicensed "transfers." Nor may an unlicensed transfer be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12 where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." An unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property. Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus the proviso of paragraph (4) specifies that "no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." In issuing paragraph

(4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property.

(5) The Treasury Department has always considered that when the Alien Property Custodian has vested any property, it would not be in the national interest for the Treasury Department thereafter to grant licenses authorizing the creation or acquisition of any interest in the property. Formerly it was the practice of the Department, whenever it was notified by the Custodian that a particular property had been vested, to issue a specific release to the Custodian of all control of the property under Executive Orders Nos. 8389 and 9193. Paragraph (1) of General Ruling No. 19 constitutes a general release of such control in the case of all German and Japanese property vested by the Custodian. Paragraph (2) of the General Ruling is intended to make it clear that a release of control over any vested property to the Alien Property Custodian, whether by specific release or by reason of the General Ruling, operates as a final denial by the Secretary of the Treasury of any pending application for license or other authorization relating to such property and that no application for a license authorizing the creation, acquisition, or transfer of any interest in such property will thereafter

be entertained or granted. The paragraph is thus a formal statement of what has always been the position of the Treasury Department—namely, that once blocked property has been vested by the Custodian, there is no longer any possibility that an unlicensed attachment may ripen through the issuance of a Treasury license into a seizure and acquisition of an interest in such blocked property.

(6) In view of the fact that the Alien Property Custodian has publicly announced his intention of vesting all German and Japanese property in the United States, it will be the general policy of the Treasury Department not to grant any licenses authorizing the creation or acquisition through legal process of any interest in blocked German or Japanese property.

8. Title 31—Code of Federal Regulations.—Chapter 1, Part 130, issued April 10, 1940 (5 F. R. 1401):

* * * * *

§ 130.2 *Definitions.* * * *

* * * * *

(c) The terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness or obligations, financial securities commonly dealt in by bankers, brokers, and investment houses, notes, debentures, stocks, bonds, coupons, bankers' acceptances, mortgages, pledges, liens or other right in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, other evidences of title or ownership, goods, wares, merchandise, chattels, stocks on

hand, ships, goods on ships, real estate mortgages, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, insurance policies, safe deposit boxes and their contents, annuities, etc.

* * * * *

9. Title 31—Code of Federal Regulations.—Chapter I, Part 130, issued June 14, 1941 (6 F. R. 2905):

* * * * *

§ 130.2 *Definitions.* * * *

* * * * *

(c) The terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness or obligations, financial securities commonly dealt in by bankers, brokers, and investment houses, notes, debentures, stocks, bonds, coupons, bankers' acceptances, mortgages, pledges, liens or other right in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their

contents, annuities, pooling agreements, contracts of any nature whatsoever, et cetera:

* * * * * *

10. Sec. 977-b, New York Civil Practice Act, Laws 1936, ch. 917, as amended, Laws 1938, ch. 604, Laws 1941, ch. 926:

RECEIVERS TO LIQUIDATE LOCAL ASSETS OF FOREIGN CORPORATIONS

1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise.

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corpora-

tion, or by publication pursuant to an order obtained as hereinafter provided.

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified complaint alleging that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved, nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice, to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court.

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint, containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant

to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation, or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver.

6. The order directing service of the summons shall require the publication thereof in two newspapers published in the state of New York in the English language at least once a week for six consecutive weeks, and shall also require the mailing on or before the date of the first publication of a copy of the summons, complaint and order to the corporation at its last known principal or head office in the state or country of its domicile.

7. In an action pursuant to this section the summons must be served personally or an order directing service thereof by publication must be obtained and the first publication thereof made within sixty days after the appointment of the temporary receiver, and if served by publication, the service must be made complete by the continuance thereof.

8. If served by publication, service of the summons shall be deemed complete ten days after the date of the last publication. The action shall be deemed commenced upon the issuance of the summons. The order appointing the receiver and the papers upon which the same is granted shall be filed in the office of the clerk of the court where the action is triable within ten days after the order is made.

9. In the event an answer is interposed on behalf of the defendant, any party to the action may at any time apply for and shall be entitled to an order setting the case down for trial on a day certain as a preferred cause.

10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct judgment *appointing* a perr nent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for.

11. Such judgment shall direct that the receiver shall, as speedily as possible, reduce to cash all the assets, credits, choses in action, and other property, tangible and intangible, of the said defendant which it may have or be entitled to or may be entitled to claim or to receive in the state of New York, and shall direct said receiver to give notice to all creditors and other persons interested in the said defendant, in such manner as the court may direct and requiring them to present to the receiver proof of their claims against or interests in the said defendant within a time limited in the said judgment, which time shall not be less than sixty days after the giving of such notice. Proofs of claim shall set forth the address of the claimant and the name and address of claimant's attorney, if any.

12. Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

13. After the expiration of the time limited by the judgment for the filing of claims with the receiver, the receiver shall prepare and submit to the court a detailed account showing the assets received, the disposition thereof and the value of any claims or assets which have not theretofore been reduced to cash, with a full description of each, and a statement showing the name and address of each and every claimant and the name and address of his attorney, if any, and the amount and the nature of the claim, and a statement of the allowance or disallowance thereof, and a statement of the costs and expense of the action and of the receivership.

14. Notice of the filing of such account shall thereupon be given to all persons or their attorneys who have appeared in the action or filed claims with the receiver, by mail to the address set forth in the proof of claim or notice of appearance together with notice that on a date specified therein not less than thirty days thereafter, an application will be made to the court for settlement of the receiver's account and for partial distribution in the event all the assets are not reduced to cash and for full distribution in the event the assets have theretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances.

15. Upon the return date of such application, or at such other time fixed by the

court, the parties and claimants may be heard and proof taken and the receiver's account settled by the court or by a referee appointed for that purpose by the court.

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner: a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses, including attorneys' fees, in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with

their stockholdings, or in the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto.

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof, until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country.

19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its

existence, repeal, suspension, revocation or annulment of its charter or organic law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands, and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corpora-

tion within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Nothing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible unders the laws of such domicile.

20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor.

21. If any receiver or trustee has heretofore been appointed in this state for such corporation or its property in any action or proceeding, either before or supplementary to judgment, otherwise than in an action brought pursuant to this section, such receiver or trustee may be appointed or continued as the receiver in any action brought pursuant to the provisions of this section.

22. The appointment of a receiver pursuant to this section or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of the assets of the same corporation.

23. An action must be commenced under this section within three years from the effective date of this act or within three years from the discovery by the plaintiff or

his predecessor in interest, of any assets of said corporation in the state of New York, whichever date is the later.

24. The terms "property" and "assets" as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state.

25. If any of the provisions of this act or the application thereof, to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared separable.

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